Datagraphic, Inc. *and* **Brian Maynard** *and* **Louis Walker, Jr.** Cases 3-CA-9858 and 3-CA-10102

January 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On August 14, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and briefs in support thereof and in reply to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

AMENDED CONCLUSIONS OF LAW

Insert the following as new Conclusion of Law 4, and renumber the subsequent paragraphs accordingly:

"4. By impliedly promising employees that, if they voted against the Union, Respondent's president would bequeath the shares of Respondent to the employees upon his death, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Datagraphic, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as new paragraphs 1(b) and (c) and reletter the subsequent paragraph accordingly:

"(b) Impliedly promising employees that if they vote against Graphic Arts International Union, or any other labor organization, Respondent's president will bequeath the shares of Respondent to the employees upon his death.

"(c) Discharging or otherwise disciplining any supervisor because said supervisor failed or refused to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge employees for activities protected by Section 7 of the Act.

WE WILL NOT impliedly promise employees that if they vote against Graphic Arts Interna-

[1] Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We adopt the Administrative Law Judge's conclusion that Respondent's asserted reasons for discharging Supervisor Maynard were pretextual. In so doing, we note that the reasons given Maynard at the time of his discharge, i.e., that he was an ineffective supervisor, did not carry out company policies, and improperly used supervisory discretion, were general and conclusory and may have been references to his refusal to commit unfair labor practices. Furthermore, although at the hearing Respondent presented vague testimony that Maynard was discharged because of communication problems with employees and because of his poor handling of inventory, the record fails to establish that any such problems were other than isolated instances. Finally, there is no evidence that Respondent at any time informed Maynard that he had shortcomings in these areas which could result in his discharge or otherwise adversely affect his employment.

[3] The Administrative Law Judge found, and we agree, that Respondent impliedly promised employees that, if they voted against the Union, Respondent's president would bequeath the shares of the Company to the employees upon his death. The Administrative Law Judge, however, failed to make a specific finding as to whether this conduct was unlawful. We conclude that such reasonably tended to interfere with the employees' rights and therefore was violate of Sec. 8(a)(1) of the Act. We shall amend the Administrative Law Judge's Conclusions of Law and modify his recommended Order and notice accordingly.

tional Union, or any other labor organization, the company president will bequeath the shares of the Company to the employees upon his death.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL NOT discharge or otherwise discipline any supervisor because said supervisor failed or refused to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL offer full and immediate reinstatement to Brian Maynard and Louis Walker, Jr., to their positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make whole Brian Maynard and Louis Walker, Jr., for any loss of earnings they may have suffered by reason of their discharges, with interest.

DATAGRAPHIC, INC.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Rochester, New York, on March 10–12, 1981. Charges were filed on June 20 and November 10, 1980, and complaints were issued on July 25 and December 18, 1980,[1] alleging that Datagraphic, Inc. (herein called Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. Respondent filed answers denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and Respondent.

Upon the entire record of the case,[2] including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation, with its principal office and place of business in Rochester, New York, is engaged in the manufacture and sale of business forms and related products. During the 12 months preceding the issuance of the complaints, Respondent directly sold goods valued in excess of $50,000 from its plant in Rochester to consumers located in States other than New York. Respondent admits that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

II. THE LABOR ORGANIZATION INVOLVED

Graphic Arts International Union (herein called the Union) is a labor organization within the meaning of Section 2(5) of the Act. See *Roytype, Division of Litton Business Systems, Inc.*, 199 NLRB 354 (1972).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The complaints, as amended, allege that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Brian Maynard because he refused to engage in surveillance of Respondent's employees' union activities; by threatening to change the shift of Louis Walker, Jr., because of his union activities; by issuing Walker a negative evaluation, withholding a pay increase, and discharging him because of his union activities; and by impliedly promising benefits to Respondent's employees if they would vote against the Union. Respondent denied the allegations. The issues, accordingly, are:

1. Was Brian Maynard's discharge a violation of the Act?
2. Was Louis Walker threatened with a change of shift, issued a negative evaluation, and denied a pay increase because of his union activities?
3. Was Louis Walker discharged because of his union activities?
4. Was there an implied promise of benefits to the employees if they would not vote for the Union?

B. *The Facts*

1. Background

During the spring of 1980, Respondent's employees began to discuss the unionization of Respondent's plant in Rochester. The Union was approached by the employees in April[3] to assist them in organizing. Meetings were held with the Union's president and International representative, and employees signed union authorization cards. A petition was filed by the Union on May 2 with the National Labor Relations Board, seeking to represent all production and maintenance employees at the Rochester plant. An election was held on June 26, but the outcome was not immediately known because three challenged ballots had been cast and were sufficient in number to affect the results. The challenged ballots were subsequently resolved, and on July 28 a revised tally was issued which showed that of the 25 votes counted, 11 had been cast for, and 14 against, the Union.

2. Brian Maynard

Maynard began his employment with Respondent in June 1972. In 1978 he was promoted to the position of pressroom foreman, the position which he held at the time of his discharge. Maynard testified that a meeting was held in April, present were: Allan Shackelford, at-

[1] The complaint in Case 3-CA-10102 was further amended on February 6, 1981, and at the hearing.

[2] Certain errors in the transcript are hereby noted and corrected.

[3] All dates refer to 1980, unless otherwise specified.

torney for Respondent; George Baker, Respondent's president; Carl Cattau, the Rochester plant manager; and the supervisors. Maynard credibly testified that Shackelford and Baker said they were going to "combat" the Union and advised the supervisors, that "there were going to be plenty of meetings with the supervisors, because they were going to be involved with a campaign against the Union." At a subsequent meeting with supervisors, Shackelford told them that they were not permitted to "threaten, interrogate, promise or spy on employees."

Maynard testified that on June 9, Cattau called him into his office and told him, "Brian, you are the only person who isn't coming forth with tidbits of union information for me." He told Maynard that as of June 11, Maynard would be shifted from operating the Schrieber 800 press[4] and instead be working on the floor where he would "again be involved on a one-to-one basis with the employees." Maynard credibly testified as follows:

> Q. Did Carl say anything else during this meeting?
>
> A. Yes, he did. He told me to use my family ties and personal relationships with fellow employees at work or at home or at a bar or on and off company property, 24 hours a day, to break-up the union drive.
>
> Q. Did he say what you were supposed to do?
>
> A. Yes. He told me to tell people that he didn't believe the reason because he had heard only a couple of weeks before the petition was filed. He figured that the union involvement stemmed back way before this. And he felt the people ought to give him a chance to show him that he could do a good job. And he knew that there were promises that were made to people in the past that weren't upheld. He told me there's a chance in the Rochester Plant, if the union got in, that the company would fold. This was two weeks before the election. The election, as far as straw were taken, were still on the union side. He was worried about it. He asked me to use these points, when I talked to these people, because a lot of them I was close with, some of them I was related to; that he thought I could persuade these people to vote for the company.

Maynard further credibly testified as follows:

> Q. Did you say that the company would fold—what did you say about that again?
>
> A. That there was a chance that the Rochester Plant would close down if a union got in.
>
> Q. And what were you supposed to do with this information?
>
> A. Use it to persuade the employees that I was close with and with family ties, to vote for the company instead of the union.

In addition, Maynard credibly testified:

> Q. [D]id he ask you to use your family contacts and personal relationships to find out anything?
>
> A. Yes. He wanted me to find out information, whatever I could on who was voting which way and report back to him.
>
> Q. Did he say anything about what if the union lost?
>
> A. Yes. He did.
>
> Q. What did he say?
>
> A. He said that some people might say he was cleaning house, but he was going to smile as they went out the door.
>
> Q. Did he say who was going to go out the door?
>
> A. Yes. He stated that he was going to get the troublemakers out.

Maynard testified that on June 13 he asked to have a meeting with Cattau. At the meeting, he told Cattau that he had been advised that it was illegal for him to do what Cattau had requested. Approximately 1-1/2 hours later Cattau asked to see Maynard. At this time Cattau said, "[Y]ou are terminated because you are an ineffective supervisor; did not carry out the company policies and improper use of supervisor discretion."

Michael Dill, who was production manager of Respondent during 1980, also credibly testified that at a meeting held prior to the election, Cattau mentioned that "George Baker would be working on a plan to turn the company over to the employees in one form or another, when he passed on." Dill testified that in late May or early June, after it appeared that the Union would win the election, Respondent's strategy changed. Dill was requested to talk to several of the employees concerning the Union. Dill corroborated Maynard's testimony that at the time of his discharge, Cattau told him he was being discharged because he was inadequate as a supervisor. In addition, Dill testified that Cattau listed the reasons he was firing Maynard as "improper use of supervisory discretion and I'm not sure if it was unwilling or unable to support company policies."

Cattau testified that at the meeting with Maynard on June 9 he insisted that Maynard initiate conversations with all employees. He stated that he terminated Maynard because of his failure to follow company policy and his failure to act as a supervisor.

Cattau further testified as follows:

> Q. During the course of the campaign, what statement did you make to the employees regarding the possibility of their getting ownership of the company at some point in time?
>
> A. Prior to the election, during one of the weekly meetings that I held; a few days prior to that I had come across a piece of literature in the company files pertaining to the fact that Mr. George Baker had requested a law firm in Atlanta, Georgia, in the latter part of 1979, to investigate the possibility that upon his death the employees of Datagraphic would receive shares or holdings in the Company.

[4] The Schrieber press had been delivered in January or February and Maynard had worked on it steadily until June 11.

> Q. Okay. What was the general subject of the conversation of which you mentioned this to the employees?
>
> A. At that point in time, in our meeting we were discussing benefits. And this was not a benefit being given to the people then, but we were discussing benefits in general; the benefits that they were receiving then and possible benefits in the future.

With respect to the change in policy concerning election tactics, Cattau was asked why he wanted the names of the employees, as opposed to just a tally. He answered:

> [W]e were not really getting enough information; they were not bringing forward the information needed to see how we stood in the campaign. I then took it upon myself to direct them to give individual names and by writing the names and by making a list out of them so that we could get a better feel as to how we were doing in the campaign, and possibly have more of a knowledge as to either changing our strategy in the campaign or to know how we were doing at that point in time.

Maynard's testimony is to a large extent corroborated by the testimony of both Dill and Cattau. On June 9, when it appeared that the Union was winning the election, Respondent decided to change its strategy. Maynard was asked to initiate conversations with employees concerning the Union. I conclude that he was asked to find out from the employees what their feelings were about the Union. In addition, I conclude that he was asked to pass on the information to the employees that if the Union were successful, there was the chance that the Rochester plant would be closed. I find that Maynard was discharged because he refused to involve himself in what he regarded to be illegal activity. I find that the reason given by Cattau for the discharge, that Maynard was an ineffective supervisor, was a mere pretext. I find that the reason Maynard was discharged was because he refused to comply with Cattau's directive that he initiate conversations to ascertain what the feelings of the employees were concerning the Union.

3. Louis Walker, Jr.

a. *Discharge*

Walker began his employment with Respondent in April 1977. He testified that the union organizing drive began in the spring of 1980, that he went to all of the union meetings which were held before the election, that he signed an authorization card for the Union to represent him, and that he helped solicit others to sign cards.

Walker testified that on October 28 he and another employee, Terry Graham, were standing in front of their presses talking. Vincent DiNicola, another employee, came up to them and overheard their conversation. Walker and Graham complained to DiNicola that DiNicola was getting overtime, whereas Walker and Graham were not. I credit DiNicola's testimony as to what then ensued. DiNicola testified that Walker said to him "I know why you got all the overtime, because Carl is your buddy." DiNicola was very upset by the insinuation that he was a "buddy" of the plant manager. He then returned to his press, but soon came back to where Walker was standing, and took a swing at a pile of boxes that was next to Walker.[5] At thar point DiNicola left the plant. Later in the afternoon DiNicola called Cattau. After telling Cattau what had happened between himself and Walker, Cattau told DiNicola that he was going to fire Walker. Walker testified that that afternoon Cattau called him into his office, showed him the handbook rule against "provoking a fight or any kind of fighting or disruption in the plant," and terminated him.

A number of witnesses testified that there had been several fights in the plant both prior, and subsequent, to the incident between Walker and DiNicola. No one was fired at these times for fighting. Maynard testified that no one was ever fired for fighting or provoking a fight during the 8 years that he was employed at Respondent. Walker and Graham similarly testified. Flynn testified that he was involved in a fight with DiNicola several months after Walker was fired. Ken Heath, a supervisor, saw the altercation and approached Flynn and DiNicola, telling DiNicola to go back to his press. Neither of the two was terminated for the altercatien. Similarly, Drew and Dill testified that no one had been fired for fighting provoking a fight.

It is not clear from the record whether Walker "provoked" the fight. While I credit DiNicola's testimony that Walker called DiNicola a "buddy" of Cattau, I do not decide whether that constitutes "provocation." With respect to who struck the first blow, I credit DiNicola's testimony that he did not attempt to strike Walker, but instead attempted to, and did, strike a stack of boxes. There is no question that both Walker and DiNicola were engaged in a "fight" or argument. However, the testimony is uncontroverted that no one had been terminated for such behavior either before or after the incident. Indeed, DiNicola and Dill testified that there was constant teasing going on in the plant. Inasmuch as there was constant teasing going on and no one had previously been discharged for fighting, I do not believe that the actual reason for Walker's termination was the fighting. I believe that the reason for Walker's discharge was his prior union activities, and I find that the reason given for Walker's termination, namely, that he was engaged in fighting or provoking a fight, was a mere pretext.

b. *Threat to change shifts*

Walker testified that in August Cattau asked him to work nights. Walker stated that he could not because his wife was pregnant. Cattau then responded that he could wait until after his wife gave birth but "then he wanted me on nights." Walker further testified that he was in fact not required to work nights.

Maynard testified that Walker was never ordered to go on the night shift. Dill testified that Cattau wanted to

[5] While Walker testified that DiNicola took a swing at him, I credit instead DiNicola's version of the facts. On this point no one corroborated Walker's version. In addition, the record reflects, and I observed, that DiNicola is shorter and weighs less than Walker. It is unlikely that DiNicola would have attempted to strike Walker.

transfer Walker to the night shift because there were more people on the day shift than on the night shift and because Walker was able to run the 8-1/2- and 11-inch printers. When it was pointed out to Cattau that, because of Walker's seniority he had preference with respect to which shift he wished to work, Cattau changed his mind and decided that Walker would not be transferred to the night shift.

With respect to the reason for the intended transfer, Cattau testified as follows:

> Q. Why did you want Louie Walker, Jr., to go on the second shift?
>
> A. At that point in time, as a General Manager I found it very necessary to run as much equipment back to back, meaning from one shift to another, as I could. The flow of work going out of the building was very poor. Louie had the capability of running such pieces of equipment. I then proceeded to request him to go on night work. At that point in time the company was losing thousands of dollars every month and I had to do whatever I could to change that.

I find that the General Counsel has not sustained his burden of showing that a threat was made because of Walker's union activities. I find that Cattau had a valid reason for requesting the change in work hours. When it was pointed out to him that Walker had seniority rights with respect to shift preference, the request to change shifts was canceled. Accordingly, the allegation is dismissed.

c. *Negative evaluation and denial of raise*

Walker testified that on July 16, after the election, he received a poor evaluation and, accordingly, was not granted a raise. Dill testified that Walker was an average employee but that he was "doing below his potential." Dill recommended "a small token raise, maybe ten or twenty cents; not outstanding but something to show we have a little faith in him." Dill testified that Cattau told him, "[W]ell, Mike, you have got all of these 'needs improvement' on here. It is obvious to me that he should not get a raise."

I conclude that the General Counsel has not sustained his burden of showing that Walker was issued a negative evaluation because of his union activities. Respondent claims that the negative evaluation was issued because Walker was performing poorly. Dill did not controvert that contention. He conceded that Walker was "doing below his potential" and that he showed a number of "needs improvement" on the evaluation. Indeed, the evaluation shows six checks in the "average" category and seven checks in the category marked "needs improvement." Dill recommended a "token" raise merely to show that "we still have a little faith in him." Essentially, therefore, it was Dill who gave Walker the poor evaluation, and there is nothing in the record to indicate that this was done because of Walker's union activities. Accordingly, the allegation is dismissed.

4. Implied promise of benefits

Walker credibly testified that, at one of the meetings that was held between the employees and Cattau prior to the election, Cattau told the employees that "George Baker had said that if anything happened to him or if he ever died, that the companies, all three plants would be split up with the employees that were working there at that time." This conversation took place at one of a series of weekly meetings held after the petition was filed. Walker testified that at such meetings Cattau would tell the emloyees the "bad points" about having a union. Similarly, Graham testified that, after the petition was filed, weekly meetings were held between Cattau and the employees, at which time Cattau said "we didn't need a union." Graham further testified that at one of the meetings Cattau said that "George Baker was having his lawyers draw up papers so that when he died the company would be divided up between the employees." Flynn testified to like effect. Dill testified that the meetings of employees were split, so that the procompany employees attended one meeting and the prounion employees attended a separate meeting. At one of the meetings attended by the prounion employees, held prior to the election, Dill testified that "it was basically pointed out that the company had big plans and couldn't make any promises. But George Baker would be working on a plan to turn the company over to the employees in one form or another, when he passed on; but he couldn't go into it any further at that time."

The statements concerning Baker's turning the Company over to the employees were made at meetings specifically called to discuss the benefits of not having a union. Indeed, Dill testified that it was specifically mentioned in the meetings attended by the group consisting of the "pro-Union" employees. Accordingly, I find that Respondent implied to the employees that if they voted against the Union at some point in the future the president, George Baker, would see to it that at his death the shares of Respondent would be distributed to the employees.

C. *Discussion and Analysis*

1. Discharge of Maynard

It is well settled that a supervisor cannot be lawfully discharged for declining to commit an unfair labor practice. *Belcher Towing Co.*, 238 NLRB 446, 447 (1978), enfd. in part 614 F.2d 88 (5th Cir. 1980). I have found that Maynard was instructed to do various things which would have constituted unfair labor practices. Thus, Maynard was told that there was a chance that the Rochester plant would fold if the Union was elected. He was to use this information to persuade employees to vote against the Union. Such a remark, if made to employees, would violate Section 8(a)(1) of the Act. See *Publishers Printing Co., Inc.*, 233 NLRB 1070, 1072 (1977), enfd. 625 F.2d 746 (6th Cir. 1980). In addition, I have credited Maynard's testimony that Cattau wanted him to "find out information, whatever I could on who was voting which way and report back to him." Such conduct on the part of Maynard would have constituted

coercive interrogation of employees concerning their union activities in violation of Section 8(a)(1) of the Act. See *Osco Drug, Inc., a wholly owned subsidiary of Jewel Food Companies, Inc.*, 237 NLRB 231, 233 (1978).

Accordingly, I conclude that Maynard was requested to engage in activities which would have constituted unfair labor practices in violation of Section 8(a)(1). His discharge, because of his failure to violate Section 8(a)(1), is in itself an unfair labor practice in violation of Section 8(a)(1) of the Act.

2. Discharge of Walker

With respect to the discharge of Walker on October 28, Respondent had been aware of Walker's prounion sympathies. Dill testified that Walker was identified to Cattau as being "a hard-core union supporter." Respondent's attitude towards the Union is also clear. I have credited Maynard's testimony that Cattau told him to use his personal relationship with employees to persuade them to vote for the Company and "break up the union drive." With respect to the timing of the discharge, it occurred approximately 4 months after the election. I believe that in the interval Respondent was looking for a proper "excuse" so as to be able to terminate what it regarded as the "hard-core" union supporters. See *Butler-Johnson Corporation*, 237 NLRB 688, 690 (1978), enforcement denied on other grounds 608 F.2d 1303 (9th Cir. 1979).

I conclude that the General Counsel has made a *prima facie* showing to support the inference that the protected activity was a motivating factor in Respondent's decision to discharge Walker. See *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). As discussed above, I regard Respondent's contention that Walker was discharged for fighting as mere pretext—this, in view of the uncontroverted testimony that no employee was discharged for fighting or provoking a fight, either before or after Walker's termination.[6] Clearly, therefore, Respondent has not shown that the "same action would have taken place even in the absence of the protected conduct." See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Accordingly, I conclude that Respondent, by its discharge of Walker, violated Section 8(a)(1) and (3) of the Act.

3. Motion to amend complaint

The General Counsel has moved to amend the complaint to include, as a separate violation of Section 8(a)(1), Respondent's instructions to its supervisors to provide it with the names of the union adherents and instigators. This motion was first made in the General Counsel's brief (p. 25, fn. 61). Respondent has objected to the motion on the ground that Respondent "did not have the opportunity to truly litigate the matter or consider it in its brief."[7]

The motion was first made after the close of the hearing in the General Counsel's brief. Respondent was not given an opportunity to meet the allegation at the hearing or in its brief. Inasmuch as Respondent was not aware that the conduct in question would be considered to be a separate violation, it did not adequately deal with the matter on cross-examination. I conclude that the matter has not been fully litigated. Accordingly, the General Counsel's motion to amend the complaint is denied. See *Chandler Motors, Inc.*, 236 NLRB 1565 (1978).[8]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Brian Maynard for his refusal to commit unfair labor practices, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
4. By discharging Louis Walker, Jr., for his union-related activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.
5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Secion 2(6) and (7) of the Act.
6. Respondent did not violate the Act in any other manner alleged in the complaints.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discharged Brian Maynard and Louis Walker, Jr., in violation of the Act, I find it necessary to order Respondent to offer them full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings they may have suffered from the time of their termination to the date of Respondent's offers of reinstatement.

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[6] The Board has held that an employer's exaggeration of a minor incident out of proportion to its importance and a severe penalty for that offense indicates a pretextual reason for that action. See *Electri-Flex Company*, 238 NLRB 713, 725 (1978).

[7] Copies of a letter dated May 4, 1981, from counsel for Respondent and a letter dated May 6, 1981, from the General Counsel are admitted into the record as ALJ Exhs. 1 and 2, respectively.

[8] The General Counsel concedes that "no evidence was presented as to whether employees explicitly knew" of the directive. It would appear that the General Counsel thus recognizes that the matter was indeed not "fully litigated."

[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[10]

The Respondent, Datagraphic, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Brian Maynard and Louis Walker, Jr., immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its facility in Rochester, New York, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaints as to which no violations have been found are hereby dismissed.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."